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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MARY JONES, through her agent, on her own behalf and on behalf of all others similarly situated, Plaintiff, v. UNITED BEHAVIORAL HEALTH, Defendant.	Case No. 3:19-cv-6999 RS **UNITED BEHAVIORAL HEALTH'S OPPOSITION TO PLAINTIFF'S MOTION TO MODIFY CLASS CERTIFICATION ORDER** Hearing Date: April 10, 2025 Hearing Time: 1:30 p.m. Hon. Richard Seeborg

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TABLE OF CONTENTS

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Plaintiff's Motion to Modify Class Certification Order, ECF No. 136 (the "Motion") is Plaintiff's third attempt at constructing a class to seek substantive, individual reprocessing relief under the Employee Retirement Income Security Act of 1974 ("ERISA") based on a challenge to certain provisions of a plan administrator's benefit guidelines. This attempt, like the previous two, does not satisfy Rule 23. Plaintiff still does not demonstrate a path to ERISA reprocessing relief against United Behavioral Health ("UBH") using common evidence.

Plaintiff first pursued class certification on the now-rejected theory that her facial challenge to UBH's 2017 Level of Care Guidelines ("LOCGs") required no examination of the putative class's individual claim denials, so long as each class member's denial decision referenced the LOCGs in some way. ECF No. 63 at 21, Motion for Class Certification ("Class Cert. Mot."). The Court granted Plaintiff's motion to certify, guided largely by the district court's decision in *Wit v. United Behavioral Health* ("*Wit*") where the plaintiffs sought and obtained class certification on a substantially identical theory. *See* ECF No. 76, Order Granting Motion for Class Certification ("Class Cert. Order"). However, after the Court certified the Class in this case, the Ninth Circuit unambiguously rejected the foundational theory on which the *Wit* classes, and the Class here, were constructed and certified.

In *Wit v. United Behav. Health*, 79 F.4th 1068 (9th Cir. 2023) ("*Wit III*"), the Ninth Circuit rejected the plaintiffs' ERISA denial of benefits claim seeking reprocessing based solely on the plaintiffs' mere showing that some provisions of UBH's LOCGs were overly restrictive and that the LOCGS were used (at least in part) for the benefit decision. Rather, to prevail on a class-wide claim for reprocessing under ERISA, the plaintiff must prove that each class member was denied benefits "based on the wrong standard *and* that he or she might be entitled to benefits under the proper standard." *Id.* at 1084. The Ninth Circuit emphasized that it "[has] *never* held that a plaintiff is entitled to reprocessing without a showing that application of the wrong standard could have prejudiced the claimant." *Id*. (emphasis added). The Ninth Circuit thus concluded that it was reversible error to certify an ERISA class of individuals seeking "to have their claims reprocessed regardless of the individual circumstances at issue in [the class's] claims." *Id.*

Recognizing that the Ninth Circuit's decision in *Wit* destroyed her class certification theory, in December 2023 Plaintiff filed a motion to "modify" the class certification order. ECF No. 100. Plaintiff's second motion misconstrued *Wit III* and revealed the individualized issues inherent in pursuing class-wide reprocessing relief. Thus, Plaintiff abandoned that motion after the Ninth Circuit issued a fourth opinion in *Wit*, 2024 WL 4036574 (9th Cir. Sept. 4, 2024) ("*Wit IV*"). Now, Plaintiff seeks to modify the class certification order again, this time seeking to certify a "reprocessing subclass" based solely on her counsel's subjective conclusion that only errant portions of the LOCGs impacted the benefit decisions for each of the class members.

This Motion to modify fares no better. Plaintiff still fails to grapple with the individualized bases for each of the benefit decisions for the class members. Plaintiff does not explain how each benefit decision was based on an errant provision of the LOCGs (or how she can prove this with common evidence), and she identifies no way for her to prove, using common evidence, that each of the class members might be entitled to benefits if different, non-errant provisions are used. Accordingly, Plaintiff's Motion should be denied for the following reasons:

First, Plaintiff is unable to satisfy Rule 23(a)'s requirements of commonality, typicality and adequacy. She cannot prove her claim for reprocessing using common evidence because the Court would need to undertake a highly-individualized and fact-intensive analysis of each class member's benefit plan and benefit decision.

Second, Plaintiff's proposed reprocessing subclass does not satisfy Rule 23(b) because of the same individualized analysis needed to prove liability. Plaintiff fails to show that common issues of law and fact predominate, or that litigating each class member's claim for denial of benefits and the right to reprocessing in one class action is superior to individual litigation.

BACKGROUND

A. Plaintiff Seeks Reprocessing Based On The Allegation That Class Members Were Improperly Denied Benefits Using The 2017 LOCGs.

UBH administers thousands of behavioral health benefit plans. The health plans contain different provisions specifying which services are covered and which are not. ECF No. 70-22, ¶ 4. Plaintiff is a former beneficiary of a health benefit plan ("Plan") for which UBH administered

behavioral health benefits.[1] *See* ECF No. 31, Amended Complaint ("Am. Compl.") ¶¶ 6–8.

Plaintiff bases her case on just one coverage term in her Plan – that services must be consistent with generally accepted standards of care to be covered. *Id.* at ¶¶ 16–17. She contends that UBH developed a set of internal guidelines called the 2017 LOCGs to determine whether a plan member's request for benefits was consistent with generally accepted standards of care, but that some provisions in those guidelines were overly restrictive. *Id.* at ¶¶ 26–36. Plaintiff asserts that UBH also created separate guidelines called Coverage Determination Guidelines ("CDGs") that were used instead of LOCGs for certain health plans, and that the CDGs referenced the LOCGs somewhere in their text. Class Cert. Mot. at 1–2, 11–12.

Plaintiff alleges that she was denied coverage for residential mental health services and claims that decision was flawed because it was based on overly restrictive provisions in the 2017 LOCGs that were applicable to mental health conditions. Am. Compl. at ¶¶ 37–48. Plaintiff brings class claims under ERISA on behalf of individuals whose claims were allegedly denied based on the 2017 mental health LOCGs, 2017 substance use LOCGs, and dozens of CDGs.

Plaintiff seeks a declaration that the 2017 LOCGs are inconsistent with generally accepted standards of care, an injunction barring UBH from using the 2017 LOCGs, and an order directing UBH to "reprocess" her and the class members' denied coverage requests under "new guidelines that are consistent with generally accepted standards of medical practice." *Id.* at ¶¶ D, F.

Plaintiff admits that her claims arise from the same essential facts as the *Wit* litigation. *See id.* at ¶ 2. *Wit* involves benefit claims using versions of the LOCGs between 2011 and May 2017, whereas this case involves benefit claims using the 2017 LOCGs between June 2017 and February 2018. UBH discontinued use of the 2017 LOCGs in February 2018. *See id.* at ¶¶ 2–5.

B. The Applicable Health Benefit Plans Contain Additional Coverage Terms Beyond Adherence To Generally Accepted Standards Of Care.

Each class member's benefits are governed by a health plan sponsored by their employer. The plan documents set forth the terms of coverage for each plan, including the benefits, definitions of covered services and exclusions, and other terms. ECF No. 70-22, ¶ 7. These terms

[1] Plaintiff is no longer a member or beneficiary of any employee benefit plan administered by UBH. *See* February 20, 2025 Declaration of Han Nguyen, ¶¶ 3–10 ("02/20/25 Nguyen Decl.").

vary considerably based on the decisions of the plan sponsor. *Id.*; *see also* ECF Nos. 59-9–62-13; December 18, 2020 Nguyen Decl., Exhibits 5–7, ECF Nos. 69-8–13.

For benefits to be payable, the plans require more than just adherence to "generally accepted standards of care." For example, Plaintiff's Plan covers only "Medically Necessary" services, which must be *all* of the following: [redacted] ECF No. 59-9 at UBHJONES0000308.

Other class members' health plans include different terms. Some provide that medically necessary services must be [redacted]." *See, e.g.*, ECF No. 59-12 at UBHJONES0001398 (Member 10111). Some plans *specifically exclude coverage* for treatment that is [redacted]" such as the 2017 LOGS. *See* ECF No. 60-12 at UBHJONES0022611 (Member 11466); *see also* ECF No. 61-10 at UBHJONES0006601 (Member 12696). Most plans exclude coverage for "custodial care," but define the term differently. *Compare* ECF No. 60-14 UBHJONES0024458 (Member 11574) *with* ECF No. 61-7 at UBHJONES0028536 (Member 12241). And, all plans include a host of other exclusions, such as for experimental or unproven services and services where the provider is not licensed to perform the service. Yet, Plaintiff, like the plaintiffs in *Wit*, focuses on only one isolated provision of the plans: the requirement that services be consistent with generally accepted standards of care.

C. Plaintiff Obtained Class Certification For Her Facial Challenge To The LOCGs By Disclaiming Any Need To Offer Class-Wide Proof Regarding Individual Class Member Benefit Decisions.

Four years ago, Plaintiff sought and obtained class certification based on her assertion that her chosen remedy – claim reprocessing – permitted her to bring a facial challenge to the 2017 LOCGs and relieved her of any obligation to show that flaws in the 2017 LOCGs had any impact on the benefit decisions for absent class members. *See* Class Cert. Mot. at 4. Plaintiff relied on the district court's class certification order in *Wit*, emphasizing that her claims in this case "concern the same conduct at issue in *Wit*," and that her evidence in support of class certification was "the same common evidence offered in *Wit*, as well as the *Wit* findings themselves." *Id*. at 7.

Over UBH's protests that resolving Plaintiff's class-wide claims would require highly-individualized inquiries into whether the alleged flaws in the guidelines caused any harm to each class member, the Court certified the Class. *See* Class Cert. Order. The Court reasoned that because, like in *Wit*, Plaintiff sought only reprocessing and not payment of benefits, she need only show that "but for the application of the 2017 [LOCGs], coverage requests would have been processed in an ERISA-compliant manner." *See id*. at 8. The Court held that Plaintiff did not need to show that each member of the class could have been prejudiced by a challenged guideline provision. *Id.* The Court noted that Plaintiff's motion was based on arguments "already credited in *Wit*," *id.* at 2, and relied extensively on *Wit* in its class certification order*, see, e.g.*, *id.* at 8.

Soon after the Class was certified, UBH moved for a stay pending resolution of UBH's post-trial appeal in *Wit*. *See* ECF No. 87, Order Granting Motion to Stay. The Court granted UBH's motion, noting that the Ninth Circuit's decision in *Wit* could "furnish UBH a fresh basis upon which to seek decertification" or "simplify[]" the issues in this case. *Id.* at 2–3.

D. In *Wit*, The Ninth Circuit Rejected Plaintiff's Facial Challenge And Theory Of Liability.

The Ninth Circuit did indeed furnish a fresh basis for decertification. In its final published opinion (*Wit III)*, the Ninth Circuit reversed the district court's decision in *Wit* granting class certification on plaintiffs' denial of benefits claims *in full,* and ordered that judgment be entered to UBH as to the named plaintiffs' denial of benefits claims. *Wit III*, 79 F.4th at 1083–86, 1089.

The Ninth Circuit rejected the central premise on which Plaintiff in this case sought and obtained class certification, and held it was error for the "district court [to] determine[] that remand [for reprocessing] was appropriate anytime UBH referenced any portion of the Guidelines in denying the claims." *Id*. at 1086. As Plaintiff concedes, under *Wit III*, a plaintiff seeking reprocessing must prove two elements. First, she must prove that her claim for benefits "was denied based on the wrong standard . . . ." *Id*. at 1084. Second, she must *also* show that "she might be entitled to benefits under the proper standard." *Id.* Reprocessing is not available without a showing that the use of the 2017 LOCGs "could have prejudiced" a class member's right to benefits *in comparison to the* "*proper standard*"—*i.e.*, the alternative guidelines that Plaintiff urges here. *Id.*; *see also id.* at 1085 (reprocessing is not appropriate if the administrator "would undoubtedly reach the same conclusion" on remand using the proper standard) (quoting *Judge v. Metro. Life Ins. Co*., 710 F.3d 651, 659–60 (6th Cir. 2013)); *id*. at 1084 (reprocessing unavailable if it would be a "useless formality") (citing *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1095–96 (9th Cir. 1985)).

The Ninth Circuit illustrated this point with two examples of the *Wit* plaintiffs' failure of common proof. First, the Court explained that (like in this case), "there are also many provisions of the [LOCGs] that Plaintiffs did not challenge and that the district court did not find to be overly restrictive." *Id*. A class member who was denied coverage based on an unchallenged provision has not been prejudiced. *Id.* The Court emphasized that this error was even more pronounced with respect to the CDGs, which merely incorporated the LOCGs. *Id.* ("There is no indication that a claimant whose claim was denied under one of the many unchallenged provisions in the [CDGs] failed to receive a full and fair review of his or her claim.").

Second, the Ninth Circuit held that the district court erred in certifying classes comprising plan members whose claims were denied "in part" due to the challenged provisions in the LOCGs. *Id.* at 1085–86. Prejudice requires a showing that a denial was "based *only* on the challenged portion of the Guidelines," *id*. at 1086 (emphasis added), so a class member whose claim was denied based on a challenged guideline provision *and* a "wholly independent" reason is not entitled to reprocessing. *Id*. at 1085. Thus, the Ninth Circuit held that the plaintiffs' reliance on "a UBH database that could identify denials that merely referenced the Guidelines" was

insufficient to meet the plaintiffs' burden under Rule 23 because the evidence showed that at least "some class members' claims" were denied for multiple reasons. *Id*. at 1085.

Just as Plaintiff initially did in this case, the plaintiffs in *Wit* insisted on remand from the Ninth Circuit that *Wit III* did not resolve their denial of benefits claims and that the district court was free to reopen class certification proceedings. *See Wit v. United Behav. Health*, 2023 WL 8717488, at *11 (N.D. Cal. Dec. 18, 2023). While the district court in *Wit* agreed with plaintiffs, *see id.* at *25–27, the Ninth Circuit once again rejected the *Wit* plaintiffs' theory of the case. In the Ninth Circuit's fourth opinion, *Wit IV*, the Court granted UBH's mandamus petition and confirmed that the *Wit* plaintiffs, and thus Plaintiff here,[2] had fundamentally misread its decision in *Wit III*. *See Wit IV*, 2024 WL 4036574, at *2. The Ninth Circuit once again confirmed that the *Wit* plaintiffs' facial challenge did not support class certification, and reiterated that *Wit III* "established that the errors in the class certification order related to the denial of benefits claim also infected the merits and remedy determinations related to that same claim." *Wit IV*, 2024 WL 4036574, at *2. In holding otherwise, "the district court [in *Wit*] lost the letter" of *Wit III*, *id*., and erred in failing to enter judgment for UBH on the denial of benefits claim and in permitting plaintiffs to seek recertification of an ostensibly "narrower" denial of benefits class. *Id.*

In short, *Wit III* holds (among other things) that, to obtain class-wide reprocessing, a plaintiff must show with common evidence that *all* class members' claims were "denied based *only on* the challenged provisions of the Guidelines." *Wit III*, 79 F.4th at 1086 (emphasis added); *see also Wit IV*, 2024 WL 4036574, at *1 (same). To hold otherwise would apply "Rule 23 . . . in a way that enlarged or modified Plaintiffs' substantive rights in violation of the Rules Enabling Act." *Wit III*, 79 F.4th at 1086 (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011)). Based on the "same common evidence" before the Court in this case, Class Cert Mot. at 7, the *Wit* plaintiffs not only failed to make that showing, they did not even prove that "such a common

[2] Plaintiff filed her first Motion to Modify before the Ninth Circuit issued its opinion in *Wit IV*, in which she proposed redefining the Class to include a "reprocessing subclass." ECF No. 100. Plaintiff misconstrued *Wit III* in multiple, fundamental ways. For instance, Plaintiff argued that *Wit III*: (1) did not direct the district court to enter judgment in favor of either party" on the denial of benefits claim; and (2) did not "express a view about whether a narrower denial of benefits subclass should be certified." *See* ECF No. 100 at 7. Plaintiff has since jettisoned these arguments since they were rejected by the Ninth Circuit in *Wit IV*. *See Wit IV*, 2024 WL 4036574, at *1–2.

showing is possible." *Wit III*, 79 F.4th at 1086; *see also Wit IV*, 2024 WL 4036574, at *1 (same).

E. Plaintiff Makes Another Futile Attempt to Salvage Her Class Claims By Proposing A Reprocessing Subclass.

Plaintiff's current Motion represents her third attempt at crafting a viable ERISA class that can satisfy the "rigorous analysis" required by Rule 23. *See Dukes*, 564 U.S. at 351 (cleaned up). With *Wit III* making clear that reprocessing cannot be ordered based on a purely facial challenge to the LOCGs, "regardless of the individual circumstances at issue in [class members'] claims," *Wit III*, 79 F.4th at 1084, Plaintiff tries to construct yet another reprocessing subclass. Plaintiff maintains that she can satisfy all of the requirements to certify a reprocessing subclass by having her counsel declare (contrary to the evidence) that each class members' benefit decisions was based solely on challenged provisions of the LOCGs. *See* Mot. at 13. First, Plaintiff attempts to define a reprocessing subclass by carving out the two examples identified in *Wit* of members who cannot be part of the class: (1) those whose denials were based, at least in part, on a ground independent of the 2017 LOCGs; and (2) those whose denials were based "even in part" upon "unchallenged" criteria. *See* Mot. at 10.[3] Specifically, Plaintiff defines the proposed subclass as:

> Any member of the Class who incurred expenses for residential treatment for which benefits were not paid, except that the Reprocessing Subclass shall not include Class members whose written notification of denial, as reflected in UBH's records, (a) identifies a reason for denying the request for coverage other than the Class member's failure to satisfy UBH's 2017 LOCGs or a Coverage Determination Guideline that incorporates the 2017 LOCGs, and/or (b) specifies that the member's failure to satisfy the applicable Guideline was based, even in part, on a portion of the applicable Guideline that was unchallenged in this action.

Mot. at 14. Then, based solely on counsel's subjective pronouncements, Plaintiff purports to identify this putative subclass through a multi-step, line-by-line review of individual decision letters. *See id.* at 17–20. Plaintiff makes no attempt to show how she can prove – with class-wide evidence – that each of the absent class members could have been prejudiced by the errant guidelines or might be entitled to benefits if Plaintiff's preferred guidelines are used on remand.

[3] Plaintiff also excludes individuals who never received the residential services for which coverage was requested, and those who did not incur unreimbursed expenses, because Plaintiff finally concedes that such individuals are not entitled to reprocessing relief. *See* Mot. at 14–17.

ARGUMENT

Under *Wit*, Plaintiff can no longer use her facial challenge to the LOCGs to wave away the individual circumstances of the class members' claim denials. She must prove, for every single class member, that an "errant portion of the Guidelines" was the *sole basis* for each class member's benefit decision, and each member of the proposed subclass "might be entitled to benefits" if Plaintiffs' preferred guidelines are used. *Wit III*, 79 F.4th at 1084, 1086. Plaintiff cannot meet this class-wide burden.

Given the individualized issues she must now confront, Plaintiff does not (and cannot) establish: (1) that she satisfies the commonality, typicality and adequacy requirements under Rule 23(a)(2)-(4); or (2) that her new class satisfies the requirements of Rule 23(b)(3). For each of these reasons, Plaintiff's Motion should be denied. *Lyon v. U.S. Immigration and Customs Enf't*, 308 F.R.D. 203, 211 (N.D. Cal. 2015) (a "modified class" must independently satisfy Rule 23).

I. Plaintiff's Proposed Modifications Do Not Remedy The Class's Fundamental Flaws.

As a threshold matter, *Wit* forecloses the quick fix to the Class that Plaintiff attempts here. Plaintiff still seeks reprocessing based on a mere showing that some portions of the guidelines are more restrictive than generally accepted standards of care, and that the LOCGs or CDGs are referenced in the benefit decision letters. Just like in *Wit*, Plaintiff ignores the additional, and varied language in the plans applicable to each class member, and she ignores that UBH made its decisions based on highly individualized clinical conclusions, often not tied to the guideline provisions challenged in this case. No narrower class can be certified because there is no common evidence to prove "in one stroke," *Dukes*, 564 U.S. at 350, that an "errant portion" of the LOCGs was the *sole reason* for *every class member's* benefit decision, let alone that each class member "might be entitled to benefits under" Plaintiff's preferred guidelines. *Wit III*, 79 F.4th at 1084, 1086. Such individualized determinations can only be made by examining each individual benefit decision. *See* Holmer Decl., Ex. 3; *see also* ECF Nos. 111-3 at 15–19, 111-4.

The Ninth Circuit's refusal to entertain a narrower reprocessing class in *Wit* proves this point. The *Wit* plaintiffs would fall squarely within Plaintiff's putative reprocessing subclass. The *Wit* plaintiffs' benefit decision letters included only the LOCGs as the basis for the denials, just

like the reprocessing subclass plaintiff describes here. *See* Mot. at 17; *Wit v. United Behav. Health*, 2019 WL 1033730, at *2 (N.D. Cal. Mar. 5, 2019) (*Wit* findings of fact finding that UBH denied coverage for *Wit* plaintiff Pfeiffer based on the LOCGs). Yet, the Ninth Circuit held, even for named plaintiffs whose letters cited *only* the LOCGs, that was insufficient to prove liability. *See id.*, at *1–4 (*Wit* trial record included named plaintiffs' decision letters). The *Wit* plaintiffs did not prove their claim for benefits or a right to reprocessing because they failed to prove that (1) the errant provisions were the sole basis their benefit decisions, and (2) they might be entitled to benefits if different, non-errant guidelines were used. *Wit III*, 79 F.4th at 1084–86. The court held that "on this record, Plaintiffs have fallen short of demonstrating that all class members were denied a full and fair review of their claims *or that such a common showing is possible*." *Wit III*, 79 F.4th at 1086 (emphasis added); *see also Wit IV*, 2024 WL 4036574, at *1 (same).

The same evidence the Ninth Circuit held insufficient in *Wit* to support even an *individual* claim cannot support a common showing for an entire class, no matter how narrowly Plaintiff seeks to redefine it. *See Wit III*, 79 F.4th at 1084 (the Rules Enabling Act "forbids using the class action procedure to expand or modify substantive rights"). Not only does Plaintiff fail to demonstrate that she can prove that all class members are entitled to reprocessing, there is no basis to conclude that such a showing is possible.

II. Plaintiff Does Not Satisfy Her Burden Under Rule 23(a) To Establish Commonality, Typicality or Adequacy.

A. Plaintiff Cannot Prove The Subclass Members Are Entitled To Reprocessing Using Common Evidence.

As the party seeking class certification, Plaintiff "must prove the facts necessary to carry the burden of establishing that the prerequisites of Rule 23 are satisfied by a preponderance of the evidence." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 665 (9th Cir. 2022). To satisfy Rule 23(a)'s commonality requirement, a plaintiff must present a common contention that is "of such a nature that it is capable of classwide resolution" and "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common answers

apt to drive the resolution of the litigation." *Id*. (citation omitted).

Plaintiff concedes that the "common question" at the heart of her reprocessing subclass is whether the members are entitled to reprocessing, assuming "UBH's use of its Guidelines was an abuse of discretion." Mot. at 21. Thus, under *Dukes*, to prevail on this Motion, Plaintiff must demonstrate that she can prove with class-wide evidence that each class member is entitled to reprocessing. She has not met that burden.

1. Plaintiff Cannot Prove With Class-Wide Evidence That Every Class Member's Claim Was Denied Based Solely On An Errant Provision.

Plaintiff tries to gloss over her evidentiary burden by proclaiming that "the Subclass definition is expressly tailored to include only people who meet the Ninth Circuit's reprocessing test." Mot. at 21. Plaintiff's argument is, essentially, that as long as her class is *defined* to include only those people who are entitled to reprocessing, she does not have to *prove* that any of them are actually entitled to reprocessing. But that does not relieve her burden. She still must prove that every class member's benefit decision was based solely on errant guidelines. She fails to do that.

Plaintiff spends numerous pages describing her counsel's convoluted methodology for identifying putative subclass members, and presents charts and other exhibits in an effort to demonstrate how counsel tried to apply that methodology to just a few dozen *out of the thousands* of benefit decisions in question. *See* Mot. at 3–6, 17–20. Plaintiff's process suffers from two primary flaws: (1) she announces that a majority of the guideline provisions are irrelevant, and then ignores them and plan terms in concluding that there are few unchallenged guidelines or independent bases to deny a benefit claim; and (2) her "evidence" that each benefit decision was based solely on challenged guideline provisions is her own counsel's subjective judgment. Contrary to Plaintiff's counsel's conclusions, each benefit decision was based on highly individualized circumstances for each member, and not the mandate of allegedly errant provisions of LOCGs. At a minimum, this would need to be assessed and determined for each class member.

a. Plaintiff's Proposed Method For Identifying "Unchallenged" Provisions And "Independent" Grounds For Benefit Decisions Ignores Large Portions Of The Guidelines And The Plans.

Even Plaintiff concedes that members whose claims were denied (even in part) for reasons

not challenged in this case are not entitled to reprocessing. Thus, Plaintiff purports to follow a multi-step process to identify which provisions of the 2017 LOCGs are "unchallenged" and identify any "independent" grounds for the benefit decisions. *See* Mot. at 15–17. But Plaintiff ignores entire pages of the guidelines based on her own conclusion that they need not be considered, and she ignores all of the independent grounds that can support a benefit decision.

First, Plaintiff removed entire pages of the LOCGs based on her unilateral conclusion that they were not "criteria" for benefit decisions. *See* ECF No. 136-18 ("Reynolds Decl.") ¶ 4 and Ex. 2. For example, Plaintiff proclaims that the LOCGs' Clinical Best Practices for All Levels of Care are not criteria for benefit decisions. Mot. at 6 n.7. But she *explicitly does not challenge* the "Common Admission Criteri[on]" that makes conformance "with Optum's best practice guidelines" an explicit requirement for coverage. Reynolds Decl., Ex. 1 at UBHWIT0622890–92. Plaintiff similarly ignores the CDGs' extensive guideline provisions which list the LOCG criteria as only one source of guidance among several others. *See, e.g.*, 02/20/25 Nguyen Decl., Ex. 1 at pp. 7–11 (Substance-Related and Addictive Disorders CDG). Plaintiff does not even submit copies of the CDGs that served as the basis for some of the class members' coverage decisions, and she fails to acknowledge that *none* of the independent, non-LOCG criteria in those CDGs were challenged in any way in *Wit*. *Wit III*, 79 F.4th at 1085. (explaining that the CDGs "included many unchallenged provisions" and "some [CDGs] incorporated the [LOCGs] only 'as support in a specific paragraph or paragraphs'"). Just like in *Wit*, Plaintiff pretends such language in the CDGs does not exist. And just like in *Wit*, this Court cannot do so. *Id*. ("The flaw in class certification is even more apparent with regard to the [CDGs] . . . . [T]he incorporation of flawed [LOCGs] does not demonstrate that class members whose claims were denied under the [CDGs] were necessarily denied a full and fair review.").

Second, Plaintiff's identification of "challenged" and "unchallenged" provisions is flawed because Plaintiff identifies provisions as "challenged" even if the Court in *Wit* never found them to be errant. For example, Plaintiff now contends that a requirement in the LOCGs that services must be "[c]linically appropriate for the members' behavioral health conditions based on generally accepted standards of clinical practice and benchmarks," is somehow improper. *See*

Reynolds Decl., Ex. 6 at p. 1. That proposition is patently absurd, and of course, the district court in *Wit did not find* that the provision was errant. *See Wit v. United Behavioral Health*, 2019 WL 1033730, at ¶¶ 209–12 (N.D. Cal. Mar. 5, 2019); *Wit III*, 79 F.4th at 1086–87. Nor does Plaintiff contend that she can present common evidence to prove that provision is improper on its face. Rather, the real question is whether UBH properly applied that provision to each benefit decision, which can only be determined on an individual member-by-member basis.

Third, Plaintiff's purported identification of few "independent" grounds for the benefit decisions is equally flawed. *See* Reynolds Decl. ¶ 5 and Ex. 3 (purporting to identify "coverage criteria appearing in the 2017 LOCGs that pertain to plan exclusions or prerequisites other than medical necessity."). In *Wit*, the Ninth Circuit concluded that the plans do not require coverage for all services that are consistent with generally accepted standards of care. Rather, consistency with generally accepted standards of care is one of many conditions of coverage and "'a service that is consistent with [generally accepted standards of care] may, nonetheless, be excluded from coverage under a particular member's plan.'" *Wit III*, 79 F.4th at 1077. Yet, Plaintiff failed to take into account the language in the ERISA benefit plans themselves or the benefit decisions that were based on plan requirements other than generally accepted standards of care.

For example, and as noted above, most plans include separate coverage exclusions for "custodial care" services. But "custodial care" services are *also* not covered *under the LOCGs themselves*. Reynolds, Decl. Ex. 1 at 18–19. Although Plaintiff purports not to challenge this "custodial care" portion of the LOCGs, she does so "**only if** the definition of 'custodial care' in the member's plan is **identical** to the definition in the Guideline." Reynolds Decl., Ex. 3. Indeed, while Plaintiff ultimately excludes Sample Member 11574 from the reprocessing subclass [redacted], she does so only after a detailed comparison of the definition of custodial care in that member's *individual benefit plan* to the definition of custodial care in the 2017 LOCGs. Reynolds Decl., Ex. 9 at 8. The individualized, subjective nature of this analysis is only confirmed by Plaintiff's *inconsistent treatment* of references to custodial care even among the small number of sample class members. For example, the letter sent to Sample Member 10467 is explicit that benefits [redacted]

[redacted]. Reynolds Decl., Ex. 14 at 31. Yet, unlike Sample Member 11574, Plaintiff announces that Sample Member 10467 *is* a subclass member with "No" "Indep. Ground" or "Unchallenged Criterion," Reynolds Decl., Ex. 12, but provides no analysis or explanation of her divergent conclusion.

Similarly, Plaintiff agrees that the initial letter sent to Sample Member 12782 was based on an "independent ground," but she fails to explain what that "independent ground" is. Reynolds Decl., Ex. 9 at 12. The initial letter to Sample Member 12782 [redacted] Reynolds Decl., Ex. 14 at 102–103. The letter states [redacted]", *id*. at 103, and the administrative record confirms it was the LOCGs. Reynolds Decl., Ex. 13 at 262 (describing the "[redacted]. Yet Plaintiff offers no method (other than her counsel's say-so) for determining whether this letter reflects an "independent ground" for the decision. Any such determination requires a detailed analysis of the letter and the administrative record for that decision.

Likewise, UBH's letter to Class Member 10209 [redacted]" ECF No. 110-7, 02/09/24 Nguyen Decl., Ex. 6. But again, Plaintiff offers no common method for proving whether this decision, and others like it, were based on an unchallenged portion of that CDG, without a line-by-line analysis of both the letter and the CDG.

As Plaintiff's own charts demonstrate, that is equally true of the entire proposed class. *See* Reynolds Decl., Exs. 9, 10; *see also* Holmer Decl., Ex. 3. Whether a benefit decision is based on an errant provision or an "independent ground" cannot be determined for the entire class "in one stroke," *Dukes*, 564 U.S. at 350, based on Plaintiff's inherently individualized methodology.

b. Whether Each Absent Class Member's Benefit Decision Was Based Solely On Errant Guideline Provisions Requires Individualized Assessment Of Each Decision.

Even if Plaintiff could somehow prove that a "challenged" guideline provision was actually applied to class members' benefit decisions "in one stroke" with common evidence,

Dukes, 564 U.S. at 350, that would not be sufficient to meet her burden of proving commonality. Determining whether class members' benefit decisions were based *solely* on a challenged guideline provision necessarily entails a detailed "individualized inquiry" into the language of ERISA benefit plans and thousands of individual benefit "denial letters," which renders "class certification . . . improper." *Condry v. UnitedHealth Grp., Inc.*, 2021 WL 4225536, at *4 (9th Cir. Sept. 16, 2021) (reversing class certification for lack of typicality where plaintiff challenged the sufficiency of ERISA decision letters); *see also Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) ("The commonality and typicality requirements of Rule 23(a) tend to merge.").

Judge Chen's decision in *Bain v. Oxford Health Insurance Inc.*, 2020 WL 808236 (N.D. Cal. Feb. 14, 2020), which involved claims substantially similar to Plaintiff's here, illustrates the required inquiry. The plaintiff in *Bain*, also a member of a UBH-administered plan, opted out of the *Wit* class. She then filed a separate suit alleging that she was improperly denied coverage for mental health residential treatment based on UBH's use of the 2012 LOCGs. *See id.* at *1–4. Following the bench trial in *Wit*, the *Bain* plaintiff sought judgment based on the finding in *Wit* that the 2012 LOCGs suffered from various defects. *See id.* at *8–9. However, because UBH's decision letter to the plaintiff in *Bain* did not "quote specific parts of or otherwise refer to specific provisions" in the LOCGs, the court found it was "hard to point to any specific deficiency in the Guidelines that impacted the instant case" and thus it was "not clear *how* the decision to deny benefits actually relied on the LOC Guidelines." *Id.* at *9. Thus, the court concluded that the factual findings in *Wit* were not determinative of UBH's liability in *Bain* "because the record [was] not clear as to any specific causative connection to the decision to deny benefits." *Id.*

Plaintiff here encounters the same issue – she cannot demonstrate that every member of the class could have been prejudiced by application of the guidelines, or even attempt to do so, without undertaking a painstaking analysis of each and every putative class member's benefit decision. Recognizing the subjective judgment necessary to do that analysis, Plaintiff performs *no* analysis at all. She presents the Court with two rudimentary charts, each with two columns. The first column contains the language in the Sample Class's denial letters, and the second contains Plaintiff's counsel's one-word conclusion ("Yes" or "No") as to whether every portion of the

benefit decision tracks to a challenged provision. Reynolds Decl., Ex. 9, 10. Plaintiff makes no attempt to explain how her lawyer made each of those decisions because she cannot. Plaintiff tells the Court to simply take her word for it and foists the burden of *disproving* her counsel's conclusory assertions onto UBH.

But what Plaintiff attempts to reduce to a binary "Yes/No" proposition in her Exhibits 9 and 10, is in fact a complicated analysis that does not lead to common results. On their face, the letters show that they are based on individualized analyses of each member's clinical condition, and not specific challenged provisions in the LOCGs. As illustrated in UBH's Exhibit 3, the clinical reasonings stated in the benefit letters from the Sample Class are rife with language that cannot be tied to particular portions of the LOCGs using any common evidence or methodology.

For example, the letter for Class Member 11081 states as one basis for the benefit decision that the member's [redacted]." *See* Reynolds Decl, Ex. 10 at 6–7). And the letter for Class Member 12782 states that [redacted]" *Id*. at 16. Plaintiff fails to attribute these statements to any challenged LOCG provision, yet she still asserts that both of these decisions are based *solely* on challenged provisions. *See* Reynolds Decl., Ex. 12 at 3. There is no basis to conclude that that these members can be part of the subclass.

Just like in *Bain*, trying to prove, as Plaintiff must, that a member's denial was based entirely on "challenged" criteria would necessarily devolve into thousands of mini-trials, in which the Court would need to analyze each decision letter line-by-line to determine it was based *solely* on a challenged criterion. That is antithetical to commonality under Rule 23(a)(2). *See Robbins v. Phillips 66 Co.*, 343 F.R.D. 126, 131 (N.D. Cal. 2022) (Seeborg, J.) (denying class certification; commonality is not satisfied if class members' right to relief "might depend on facts unique to each claimant, necessitating mini-trials, beyond mere damages calculation").

Indeed, in her now-withdrawn prior motion to modify the class, Plaintiff attempted (albeit unsuccessfully) to do that sort of individualized analysis for each sample class member. *See* ECF

No. 99-7 (Plaintiff's prior analysis purporting to ascribe specific language in class members' decision letters to specific purposes "flaws" in the LOCGs). But Plaintiff now does not even attempt to make that showing in the instant motion because she knows it is an impossible task. *See* ECF No. 111 at 15–19; ECF No. 110-4 (UBH opposition to Plaintiff's prior motion identifying pervasive issues in Plaintiff's methodology). Plaintiff now proclaims that her class definition is all the evidence she needs, and effectively asks the Court to impermissibly shift the burden on to UBH to *disprove* that the decision letters do not contain unchallenged criteria. Mot. at 19–20, 22. That is not allowed under Rule 23 and cannot support class certification. *Olean*, 31 F.4th at 663 (Rule 23 cannot be used to alter "the substance of the claims or plaintiffs' burden of proof"); *see also Wit III*, 79 F.4th at 1086 (Rule 23 cannot be "applied in a way that enlarge[s] or modifie[s] Plaintiffs' substantive rights in violation of the Rules Enabling Act"); *Ellis v. J.P. Morgan Chase & Co.*, 2015 WL 9178076, at *4 (N.D. Cal. Dec. 17, 2015) ("Plaintiffs cannot shift their burden to Defendants simply because Plaintiffs present no evidence of their own.").

2. Plaintiff Cannot Prove With Class-Wide Evidence That Every Class Member "Might Have Been Entitled To Benefits" Under Plaintiff's Preferred Guidelines.

UBH's Exhibit 3 also highlights Plaintiff's inability to demonstrate that each class member might be entitled to benefits if her preferred guidelines were used on reprocessing. The denial letters reflect an individualized assessment of each member's condition and treatment status. *Id.* The letters assess things like the stability of a member's symptoms, their progress in treatment, and their support systems. *See, e.g.*, Holmer Decl., Exhibit 3 (Denial Letters for Members 10111, 11459, 11546). Not only does Plaintiff fail to establish that such considerations reflect a denial based on a challenged provision, the factors discussed often align directly with factors that even Plaintiff's preferred guidelines (such as ASAM and LOCUS) recommend considering. *See id.* Such language raises individualized questions as to whether a member's benefit decision would be different, even if evaluated under the "proper" standard. The answer to those questions lies in evidence specific to the class member at issue – not in common evidence.

Plaintiff also disregards all evidence outside of the denial letters. Plaintiff's view is far too narrow. *Bain* illustrates the necessary analysis that Plaintiff declines to undertake. To determine

whether the plaintiff in that case was entitled to reprocessing – the exact remedy Plaintiff seeks here – the *Bain* court probed well beyond UBH's decision letter, reviewing the entire administrative record underlying the decision. *See Bain*, 2020 WL 808236, at *10. While much of the court's analysis is redacted, it is clear that the court examined evidence regarding plaintiff's condition and how UBH evaluated her condition. *See, e.g.*, *id.* (observing that a peer-to-peer was performed and plaintiff's treating physician indicated that her situation was not severe). While the court ultimately concluded the plaintiff was entitled to reprocessing, it did so only after an extensive examination of the evidentiary record – not just UBH's decision letter. Critically, the fact that the court ordered remand for reprocessing, and *not* the direct payment of benefits, did not alter the need for a fulsome analysis of the plaintiff's administrative record. Other ERISA decisions are in accord with *Bain*, performing a full review of the administrative record, and not only the denial letter. *See, e.g.*, *Judge*, 710 F.3d at 659–60 (declining remand based on review of the full administrative record, including the "objective medical evidence"); *McCartha v. Nat'l City Corp.*, 419 F.3d 437, 447 (6th Cir. 2005) (after review of plaintiff's administrative record, concluding remand would be useless given legitimate basis existed for denial).

Here, Plaintiff asks this Court to certify a class of thousands of individuals just like the *Wit* opt-out plaintiff in *Bain*, and asks the Court to order the exact same relief (claim reprocessing) ordered in *Bain*. But she asks this Court to do so without any of the necessary individual analysis that was performed in *Bain* and similar cases, simply because she styled this case as a class action. That is precisely the sort of shortcut to liability that the Ninth Circuit rejected in *Wit* as a violation of the Rules Enabling Act, *Wit III*, 79 F.4th at 1086; *see also Olean*, 31 F.4th at 663 ("As a claims-aggregating device, Rule 23 leaves the parties' legal rights and duties intact and the rules of decision unchanged, and it does not affect the substance of the claims or plaintiffs' burden of proof") (cleaned up). This cannot support class certification.

It is not a theoretical possibility that class members' claims would still be denied under Plaintiff's preferred guidelines. For some class members, there is strong evidence that application of a different guideline would have the same outcome, and remanding their benefits claim for reprocessing would be a "useless formality." *See Wit III*, 79 F.4th at 1084 (reprocessing

unavailable if it would be a "useless formality"). For example, the administrative record for Class Member 11773 shows that [redacted] (ECF No. 59-6 at 135 (UBHJONES0005328)), [redacted]. ECF No. 110-8, 02/09/24 Nguyen Decl., Ex. 7 at 9 (UBHJONES0005359). Similarly, with respect to Plaintiff herself, [redacted]. *See* Am. Compl. ¶ 37. [redacted]. *See* ECF No. 59-5 at 3 (UBHJONES0000928); ECF No. 62-14 at UBHJONES0001074; ECF No. 69-5 at UBHJONES0001209. [redacted]. ECF No. 69-6 at UBHJONES0000087. At a bare minimum, the Court cannot presume, without examining the administrative record for each class member, that reprocessing may yield a different result.

There is no way for Plaintiff to prove, using common evidence, that each class member's benefit decision was based solely on a challenged guideline provision, and there is no way for her to prove, using common evidence, that each class member might be entitled to benefits upon reprocessing. Even in the small sample of class members, many were not denied benefits solely based on a challenged provision, and many would not be entitled to benefits on reprocessing. And most importantly for the present motion to certify a reprocessing subclass, adjudicating Plaintiff's claim requires an inherently individualized and fact-intensive inquiry into the administrative records of each class member. It is not subject to common, class-wide proof.

B. Plaintiff's Claims Are Not Typical Of The Reprocessing Subclass's Claims.

Plaintiff does not meet her burden of establishing Rule 23(a)(3)'s "typicality" requirement for the same reasons. Typicality requires the court to determine whether the named plaintiff has suffered the same or a similar injury to other members of the class. *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1141 (9th Cir. 2016). Certification is not appropriate where individualized

inquiries are needed on causation and injury. *See Condry*, 2021 WL 4225536, at *4; *see also Gardner v. Health Net, Inc.*, 2010 WL 11579028, at *3 (C.D. Cal. Sept. 13, 2010) (typicality "is not met in an action that would require individualized inquiries regarding causation and injury."). The Ninth Circuit's decision in *Condry* is on point. In *Condry*, the plaintiff brought an ERISA class action alleging that class members were denied a "full and fair review" of their claims. *Condry*, 2021 WL 4225536, at *2. The court affirmed denial of a "Claims Reprocessing Class", and reversed certification of another class that was based on the content of the administrator's decision letters. *Id*. at *4. The court held that the named plaintiffs were not typical of the class because "the individualized inquiry required to evaluate the sufficiency of the denial letters," rendered "the class representatives' claims . . . not typical of the class members' claims." *Id*.

Plaintiff's case presents the same need for an individualized review of the decision letters, as well as the full administrative records for each class member. It is not enough, as Plaintiff claims, that her denial letter is "devoid of any reference to an 'Unchallenged Criterion.'" Mot. at 22. To prove her claim for denial of benefits, and to prove a right to reprocessing, this Court must engage in an intensive analysis of Plaintiff's full record, similar to Judge Chen's fact-intensive analysis in *Bain*, to determine whether her request for coverage might have been approved under a different set of guidelines. This analysis is specific to Plaintiff and would be needed for each of the class members based on their own individual administrative record.[4]

C. Plaintiff Fails To Demonstrate She Is An Adequate Representative.

"The commonality and typicality requirements of Rule 23(a) . . . tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest." *Gen. Tel. Co. of Sw.*, 457 U.S. at 157 n.13. Thus, Plaintiff fails to satisfy Rule 23(a)(4)'s adequacy requirement for all the same reasons that she cannot satisfy the requirements of commonality or typicality. Given the individualized inquiries required to assess whether any class member is entitled to reprocessing,

[4] Plaintiff's benefit determinations were based on the 2017 LOCGs relevant to mental health conditions. On their face, her claims are not typical of class members whose requests were denied based on provisions specific to substance use and CDGs that were never applied to her. *See* ECF No. 70-14 (Romano Declaration in Support of Opposition to Class Certification, Exhibit 8).

the claims of Plaintiff and the class are not sufficiently "interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id*.

III. Plaintiff's Proposed Class Does Not Satisfy The Requirements Of Rule 23(b)(3).

Plaintiff's proposed reprocessing subclass also does not satisfy Rule 23(b)(3).[5] Under Rule 23(b)(3), Plaintiff must demonstrate that (1) questions common to the class predominate over individual questions, and (2) a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). The focus is whether "a proposed class is sufficiently cohesive to warrant adjudication by representation." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 469 (2013) (internal quotations omitted).

A. Plaintiff's Proposed Class Raises Numerous Individualized Questions, Which Predominate Over Any Purportedly Common Ones.

"Rule 23(b)(3)'s predominance criterion is even more demanding than [commonality under] Rule 23(a)," *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). A class that meets Rule 23's commonality and typicality requirements may still fail to satisfy the rigorous demands of Rule 23(b)(3). *See, e.g.*, *Castillo v. Bank of Am., NA*, 980 F.3d 723, 726–27 (9th Cir. 2020).

The questions for reprocessing – (1) whether each benefit decision was based solely on a challenged provision and (2) whether each class member might be entitled to benefits if different guidelines are used – are precisely the kind of individualized issues that defeat predominance. Courts must "ensure that the class is not defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct." *Castillo*, 980 F.3d at 730 (quoting *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 (9th Cir. 2016)). In *Castillo*, the Ninth Circuit held that even though the defendant had a common policy in place regarding calculating overtime wages, common issues did not predominate given evidence that some class members were not exposed to the improper policy, or were exposed but were nevertheless properly paid, and therefore did not suffer an injury. *See id.* at 731–33. Absent a "common method of proof" establishing class-wide liability, the plaintiff in *Castillo* failed to

[5] Plaintiff moves to certify the subclass exclusively under Rule 23(b)(3). *See* Mot. at 1, Statement of Issues to Be Decided; *see also* Mot. at 23–24 (same). Plaintiff does not move for certification under Rule 23(b)(1) or 23(b)(2).

"show that questions of law or fact common to class members predominate." *Id.* at 732.

This case is no different – Plaintiff cannot establish that all class members are entitled to reprocessing using common evidence. To the contrary, any common questions would be overwhelmed by the thousands of individual determinations needed to determine which class members' claims decisions were solely attributable to UBH's application of the challenged provisions of the 2017 LOCGs, and which class members might be entitled to benefits if Plaintiff's preferred guidelines are used. Analysis of class members' administrative records, including medical records, represents a "highly individualistic determination" that "militat[es] against class certification." *Pecere v. Empire Blue Cross and Blue Shield*, 194 F.R.D. 66, 71 (E.D.N.Y. 2000) (cleaned up) (holding case was "ill-suited for class status because plaintiffs' claims hinge on whether or not the treatment for each of their individual conditions was 'medically necessary'").

Plaintiff faces a similar burden in proving that all members of the subclass have standing to maintain their claims, given that many of the proposed subclass members assigned their rights to bring an ERISA claim to their healthcare provider. The Ninth Circuit has recognized that benefit plan members can assign certain rights under ERISA to a healthcare provider, including the right to sue for non-payment of benefits. *See S. Coast Specialty Surgery Ctr., Inc. v. Blue Cross of California*, 90 F.4th 953, 959 (9th Cir. 2024). In assigning such rights, however, the member's rights to sue are extinguished. *See Koblentz v. UPS Flexible Emp. Ben. Plan*, No. 12-CV-0107-LAB, 2013 WL 4525432, at *2 (S.D. Cal. Aug. 23, 2013) ("an assignment" by an ERISA beneficiary to a healthcare provider "in some cases, may deprive the participant of her right to sue"); Restatement (Second) of Contracts § 317 ("An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which *the assignor's right to performance by the obligor is extinguished in whole or in part* and the assignee acquires a right to such performance." (emphasis added)). Whether an assignment encompasses (and thus forfeits) the right to bring an ERISA claim depends on an individualized analysis of the language of each assignment. *See South Coast Specialty Surgery Ctr.*, 90 F.4th at 959.

To award relief in this case, the Court will need to determine which members of the class

transferred their right to seek ERISA relief here, and therefore lack standing to sue. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 430–31 (2021) ("Every class member must have Article III standing in order to recover individual damages.") Here, at least some class members expressly assigned away their right to sue for non-payment of benefits to their provider. *See, e.g.*, Nguyen Decl., Ex. 2 at p.6 (Sample Member 12696: [redacted]. And for every class member, that is, by definition, an individualized question that requires a careful examination of: (1) whether the class members assigned any aspect of their benefits; and (2) if so, whether their right to sue under ERISA is fairly encompassed within the scope of that assignment. *See South Coast Specialty Surgery Ctr*, 90 F.4th at 959 (analyzing the written terms of an assignment and concluding that the assignment encompassed "the right to sue for non-payment of benefits" even though the "form does not expressly state that [the provider] may sue insurers on its patients' behalf".) At trial, Plaintiff will bear the burden of proving that element of standing by showing each class member did not assign their benefits. *TransUnion*, 594 U.S. at 430–31 ("plaintiffs bear the burden of demonstrating that they have standing"). Yet Plaintiff offers no common method to prove those requirements for standing, and individualized issues will necessarily overwhelm any common questions.[6] *See Olean*, 31 F.4th at 668 n. 12 ("Rule 23 also requires a district court to determine whether individualized inquiries into this standing issue would predominate over common questions").

Plaintiff also does not carry her burden of showing that she can overcome UBH's defense of administrative exhaustion based on class-wide evidence. Many of the putative class members' plans contain explicit exhaustion requirements. *See* ECF No. 62-10 at UBHJONES0010353–56, -359 [redacted] ECF No. 60-7 at UBHJONES0019766–67, -773 [redacted] Under settled Ninth Circuit law, those express plan terms *must be enforced as written*, and federal common law principles such as

[6] Plaintiff cannot use Rule 23 to shift the burden to UBH to *disprove* absent class members' standing based on an assignment of benefits. *Olean*, 31 F.4th at 663 (Rule 23 cannot be used to alter the burden of proof). But even if the issue of assignments by individual class members constitutes an affirmative defense—it does not—Rule 23 cannot be used to deny UBH its right to litigate those unique defenses as to each absent class member. *Dukes*, 564 U.S. at 367.

futility cannot be "used to alter the unambiguous written terms of a formal plan document." *Cinelli v. Sec. Pac. Corp.*, 61 F.3d 1437, 1445 (9th Cir. 1995); *see also Greany v. W. Farm Bureau Life Ins. Co.*, 973 F.2d 812, 822 (9th Cir. 1992) (similar). As the Ninth Circuit observed in *Wit*, exhaustion is required regardless of whether Plaintiff styles her reprocessing claim as one for denial of benefits or breach of fiduciary duty. *Wit III*, 79 F.4th at 1089 ("exhaustion *is* required if a plaintiff's statutory claim is a disguised claim for benefits"). And some plans include enforceable limitations periods requiring members to bring suit within two years of a denial of benefits, raising additional individualized issues. *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 571 U.S. 99, 105–06, 108 (2013) (reasonable limitations periods in ERISA plans are enforceable); *see* ECF No. 59-18 at UBHJONES0015604.[7]

"[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its . . . defenses to individual claims." *Dukes*, 564 U.S. at 367. Both of these defenses require examination of each plan *and* each member's claim, and thus overwhelm any common questions. Plaintiff fails to meet her burden under Rule 23(b)(3).

B. Class Treatment Is Not Superior And Plaintiff Offers No Plan For Managing The Highly-Individualized Questions Affecting Each Class Member's Right To Reprocessing.

The varied and individualized questions that this Court would need to answer for each of the thousands of reprocessing subclass members also demonstrates that class treatment is not a superior method of adjudicating class members' claims for reprocessing.

A class is not a "superior method for fair and efficient adjudication" under Rule 23(b)(3) if there would be significant "difficulties identifying class members . . . ."[8] *Pierce v. Cnty. of Orange*, 526 F.3d 1190, 1200 (9th Cir. 2008) (affirming decertification order because issues of proof "would be highly individualized" and subject to "too many . . . variables"). Superiority

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[7] For example, Sample Member 10467 is subject to both of these individualized defenses. (*See* No. ECF 59-19 at UBHJONES0016192–96, –205 [redacted] ECF No. 59-5 at 114 (UBHJONES0016338) [redacted] ECF No. 70-14 at 6–7 [redacted]

[8] While there is no "freestanding administrative feasibility requirement" in the Ninth Circuit, courts may consider such issues of "manageability as one component of the superiority inquiry" under Rule 23(b)(3). *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1128 (9th Cir. 2017).

requires the Court to "consider the likely difficulties in managing the proposed class action," including whether the proposed class is "objective and presently ascertainable." *Rowden v. Pac. Parking Sys., Inc.*, 282 F.R.D. 581, 585 (C.D. Cal. 2012) (class action was not "superior" when liability turned on "an individual, fact-specific inquiry" that "impair[ed] the Court's ability to effectively and efficiently manage the litigation), *aff'd in part sub nom. Martin v. Pac. Parking Sys. Inc.*, 583 F. App'x 803 (9th Cir. 2014) (affirming denial of certification where it would not be "administratively feasible to determine which individuals" were included in the class).

Here, issues of ascertainability and manageability of Plaintiff's proposed reprocessing subclass take on extra significance because, as discussed above, Plaintiff seeks to use her class definition as a substitute for class-wide proof of both elements of her substantive claim for reprocessing. Yet Plaintiff "proposed no plan to the district court for manageably determining which individuals are members" of the subclass. *Martin*, 583 F. App'x at 804 (affirming denial of class certification; plaintiff "proposed no plan" for an "administratively feasible" way to identify class members). Nor could she. As discussed above, simply determining which of the thousands of class members fall within the proposed subclass would require thousands of fact-specific and subjective interpretations of each class member's administrative record to identify whether e class member's benefit decision: (1) "identifies a reason for denying the request for coverage other than" the 2017 LOCGs or a related CDG; or (2) "specifies that the member's failure to satisfy the applicable Guideline was based, even in part," on an unchallenged criterion. Mot. at 14.

Performing the individualized analysis performed in *Bain* thousands of times over, just to decide who falls within Plaintiff's subjective class definition, is not a superior method of adjudicating class members' claims for reprocessing. *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1192 (9th Cir. 2001) ("If each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually, a class action is not 'superior.'"). Class certification should be denied for this reason as well.

CONCLUSION

For the foregoing reasons, UBH respectfully requests that the Court deny Plaintiff's motion to certify a reprocessing subclass and instead decertify the class in its entirety.

Dated: February 21, 2025

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